Office-Supreme Court, U.S.
FILED
MAY 27 1983
ALEXANDER L. STEVAS,
CLERK

82-1683

No. 82-1683

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WEST TEXAS STATE UNIVERSITY, *et al.*,
Petitioners,

v.

TINA BENNETT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

NANCY DUFF CAMPBELL
Counsel of Record

MARGARET A. KOHN
MARCIA D. GREENBERGER
NATIONAL WOMEN'S LAW CENTER
1751 N Street, N.W.
Washington, D.C. 20036
(202) 872-0670

BETTY WHEELER
HOFFMAN & WHEELER
1008 South Madison
Amarillo, Texas 79101
(806) 376-8903

Attorneys for Respondents

Dated: May 27, 1983

TABLE OF CONTENTS

Page

Table of Authorities.....ii

Question Presented.....1

Statement of the Case.....2

Reasons for Not Granting the Writ.....8

I. The Decision of the Court of Appeals Does Not Present An Important Question of Federal Law, Create a Conflict in the Circuits, or Represent a Departure from the Accepted and Usual Course of Judicial Proceedings Sufficient to Warrant Review by This Court.....8

II. The Petition for a Writ of Certiorari Should be Promptly Denied.....16

Conclusion.....20

Certificate of Service.....21

Table of Authorities

Cases — Page

Grove City College v. Bell, 687 F.2d 684 (3d Cir. 1982), cert. granted, 51 U.S.L.W. 3611 (Feb. 22, 1983).....2, 16-19

Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R., 389 U.S. 327 (1967).....9

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916).....9

Statutes and Rules

Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681-1686.....passim

Section 1681(a).....10-11

United States Court of Appeals for the Fifth Circuit Rule 25.....13

IN THE
SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM 1982

No. 82-1683

WEST TEXAS STATE UNIVERSITY, et al.,

Petitioners,

v.

TINA BENNETT, et al.,

Respondents.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Fifth Circuit

Brief for Respondents in Opposition

QUESTION PRESENTED

Whether the Court of Appeals erred in reversing the District Court's grant of summary judgment and remanding the case to permit plaintiffs to develop the

record, so that the applicability of Title IX of the Education Amendments of 1972 to West Texas State University's intercollegiate athletic program could be determined with a more complete factual record?

STATEMENT OF THE CASE

Contrary to Petitioners' Statement of the Case, the issues presented by this case in its current posture are not similar to those presented to the Court in Grove City College v. Bell, 687 F.2d 684 (3d Cir. 1982), cert. granted, 51 U.S.L.W. 3611 (Feb. 22, 1983). Grove City involves the construction of Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681-1686 [hereinafter Title IX]. This case involves whether the Court of Appeals erred in reversing the District Court's grant of summary

judgment and remanding the case to permit plaintiffs to develop the record so that the applicability of Title IX could be considered in the context of a more complete factual record.

Plaintiff-respondents are six women students [hereinafter "the students" or "plaintiffs"] enrolled at West Texas State University [hereinafter "WTSU" or "the University"] who participate in the University's intercollegiate athletic program. On April 15, 1980, they filed a class action complaint against WTSU and several of its officials, alleging sex discrimination in the University's athletic program in violation of Title IX, which prohibits sex discrimination in educational programs or activities

receiving federal financial assistance.1/

After the case was certified as a class action and while the students were engaged in discovery, the University filed a Motion for Summary Judgment with a supporting affidavit. It argued that WTSU's athletic program does not "directly" receive federal financial assistance, and therefore is not a "program or activity receiving [f]ederal

---

1/ Plaintiffs alleged sex discrimination against women in the policies and practices of the University's intercollegiate athletic program with respect to athletic scholarships, travel allowance allocations and expenditures, scheduling of games and practice times, compensation and treatment of coaches, the provision of locker rooms, practice and office facilities, supplies, equipment, and laundry facilities, the authority to spend in excess of budget allocations, and the provision of publicity, promotion and awards. Second Amended Complaint ¶19.

financial assistance" within the meaning of Title IX. The University also argued that to the extent that the Title IX regulations purport to apply Title IX to the athletic program, they are in excess of the statutory mandate.

Before responding, the students pursued an abbreviated continuation of their discovery,2/ in order to focus on the nature of federal funding at the University. In opposition to the Motion for Summary Judgment, the students argued that Title IX was intended to cover programs or activities receiving federal financial assistance regardless of the manner in which that assistance is received, and that the assistance

---

2/ In addition to interrogatories, the students took the depositions of two university officials.

received by WTSU is, under any reading of Title IX's scope, sufficient to subject its intercollegiate athletic program to Title IX's requirements.

The District Court granted the University's Motion for Summary Judgment on July 27, 1981. In a six-page memorandum opinion, the Court held that Title IX applies only to an educational program or activity that receives "direct" federal financial assistance, and that the Department of Education regulations, to the extent that they are inconsistent with this holding, are invalid. Further, the types of federal funding received by the athletic programs at WTSU, the Court determined, are general, non-specific and "indirect," and therefore not sufficient to trigger Title IX's prohibition on sex discrimination.

On appeal, the United States Court of Appeals for the Fifth Circuit, in a three-page unpublished opinion, expressly declined to decide whether the federal funding received by WTSU is sufficient to subject its athletic program to Title IX because "[a]t this point in the development of the case, plaintiffs have not been allowed to make a record of the direct funding that comes to the athletics department from the sources they identified." Slip op. at 3. Therefore the grant of summary judgment was reversed, and the case remanded to permit the students to make such a record.3/

3/ Initially, the Court of Appeals also stated that the students "should be permitted to demonstrate the sex discrimination which allegedly exists in the intercollegiate athletics program," but, in response to the University's (con't)

REASONS FOR NOT GRANTING THE WRIT

I. The Decision of the Court of Appeals Does Not Present An Important Question of Federal Law, Create a Conflict in the Circuits, or Represent a Departure from the Accepted and Usual Course of Judicial Proceedings Sufficient to Warrant Review by this Court

The University's contention that the Court of Appeals decided an important question of federal law which should be decided by this Court rests on an erroneous construction of the Court of Appeals' opinion. A proper construction of that opinion makes clear that this case in its current posture presents no question of federal law warranting review by this Court.

---

petition for rehearing, the Court deleted this statement from its opinion.

The Court of Appeals simply reversed the District Court's grant of summary judgment and remanded the case for a further development of the factual record. This Court has consistently declined, absent some special justification, to grant review of a decision of a court of appeals remanding a case to a district court for further proceedings. See, e.g., Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not ripe for review by the Court"); Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 257-58 (1916). The usual presumption against review in this Court of such decisions is especially applicable in this case.

This case as it was presented to the Court of Appeals involved two issues: (1) whether Title IX of the Education Amendments of 1972 reaches sex discrimination in an intercollegiate athletic program that receives federal financial assistance, regardless of the manner in which that assistance is received, and (2) whether, even if "direct" receipt of federal financial assistance is required, the federal funding actually received by WTSU's intercollegiate athletic program is sufficient to bring that program within Title IX.

Both of these issues involve an interpretation of the scope of Title IX's prohibition on sex discrimination in "programs or activities receiving [f]ederal financial assistance," 20

U.S.C. §1681(a). Moreover, both issues involve the application of that interpretation to the facts of this case -- that is, to the kinds of federal funding received by WTSU and its athletic program, and the way in which that funding is used by both the University and its athletic program. The Court of Appeals expressly declined to resolve either of these issues. Although its opinion does not spell out its reasoning in detail, the Court stated that "without anticipating the decision of the Fifth Circuit on these issues, we simply hold today that the plaintiffs must be permitted to present a case on the receipt of direct funds by the athletics department." Slip. op. at 3.

Recognizing the interrelationship between the legal and factual issues, the Court was unwilling to resolve the legal issues presented without further development of the factual record. In particular, it noted that the students contended that the athletic program "does indeed receive direct funds including work-study employment assistance to students who are employed in the athletics department, compulsory student fees which support the athletics program and subsidized housing for athletes." Id. The Court concluded, however, that "[a]t this point in the development of the case plaintiffs have not been allowed to make a record of the direct funding that comes to the athletics department from the sources they identified. They must be permitted

to do so." Id. Therefore, the Court remanded the case to the District Court.

The University's assertion that in this three-page, unpublished opinion4/

4/ The mere fact that the Court of Appeals addressed the issues before it in a short, summary opinion and ordered that its opinion not be published demonstrates that that Court in no way thought it was deciding a substantial federal question, or creating a conflict in the circuits. Under Rule 25 of the Rules of the United States Court of Appeals for the Fifth Circuit, every opinion "believed to have precedential value" or that "may in any way interest persons other than the parties to a case" is to be published. "Therefore, an opinion will be published if it . . . establishes a new rule of law, alters or modifies an existing rule of law . . . ; creates or resolves a conflict of authority either within the circuit or between this circuit and another; . . . concerns or discusses a factual or legal issue of significant public interest. . . ." Id. Obviously, the Court did not believe its opinion fell within any of these or the other criteria set forth in Rule 25 for determining when opinions will be published.

the Court of Appeals in any fashion addressed the question of the proper interpretation of the scope of Title IX, or the application of that interpretation to this case, is simply without merit. The Court never reached either issue, but remanded the case to the District Court for further development of the record so that these issues could be considered after a fuller factual record has been developed.

Whether the Court of Appeals was correct in remanding the case for further development of the record clearly presents no substantial federal question. For the same reason, the Court's determination creates no conflict in the judicial circuits because by its very nature it is limited

in its application to this case and the development of this factual record. Finally, the Court's decision to remand is not a departure from the accepted and usual course of judicial proceedings to warrant review by this Court in its supervisory role over the lower federal courts, as the University itself acknowledges by not asserting this ground as a reason for granting the writ.[5/]

5/ Indeed, in its petition for rehearing to the Court of Appeals, the University acknowledged that that Court "declined to address [the] issues of statutory construction [resolved by the District Court]. Instead, [the] Court . . . predicated its decision upon a perceived inadequacy in the summary judgment record. . . ." Appellees' Pet. for Rehearing at 2. The University argued that the Court's determination was for this reason incorrect and should be reconsidered. As noted above, the Court declined to grant the petition except to agree to delete the sentence in its opinion that would have permitted (con't)

II. The Petition for a Writ of Certiorari Should Be Promptly Denied

As plaintiffs have demonstrated, the decision of the Court of Appeals affords no basis for granting the petition for a writ of certiorari. Moreover, despite similarities between the underlying federal funding issues in this case, which have not yet been addressed by the Court of Appeals, and the federal funding issues presented in Grove City College v. Bell, plaintiffs respectfully request that this Court not withhold decision on the petition for certiorari in the instant case pending resolution of the Grove City case next term.

---

plaintiffs to develop the record on the merits of their claim of sex discrimination as well as the record of the federal funding that comes to the athletic program.

Because of the present posture of this case, the resolution of the federal funding issues presented in Grove City will not affect the basis for the Court of Appeals' decision in this case. The Court of Appeals, after a review of the facts presented, directed that the factual record be more fully developed before the applicability of any legal interpretation of the statute, including the interpretation at issue in Grove City, be determined. A prompt denial of the petition for a writ of certiorari will enable plaintiffs to proceed to develop the factual record in the District Court more fully, and obtain a ruling on the federal funding issues, based on that record, initially in that Court and thereafter in the Court of Appeals, if necessary.

At any stage in these proceedings, the applicability of this Court's decision in Grove City, if any, can be determined initially by the lower federal courts.6/ If, after the record is augmented, either of the parties is dissatisfied with the Court of Appeals' decision, a petition for a writ of certiorari may be filed in this Court which presents the federal funding

---

6/ For example, Grove City, as the University states, presents the question whether federal student financial aid brings a school within Title IX. The federal funding issue in this case involves, in part, the question whether federal student financial aid brings a school's athletic program within Title IX. However, even if Grove City holds that student financial aid does not subject a school to Title IX, it will not fully resolve the federal funding issues in this case because federal financial assistance other than student financial aid is involved here, and this assistance, plaintiffs assert, also brings WTSU's athletic program under Title IX.

issues on their merits, against a full evidentiary record. In short, postponement of a decision on the petition for a writ of certiorari in this case pending the resolution of the Grove City case will only delay the development of the factual record that the Court of Appeals determined must be completed before any of the federal funding issues that may be affected by this Court's decision in Grove City can be addressed. To delay the development of that record, which must be completed regardless of the outcome of the Grove City case, and before its applicability to this case can be resolved, would be unwarranted.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Nancy Duff Campbell
Counsel of Record

Margaret A. Kohn
Marcia D. Greenberger
National Women's Law Center
1751 N Street, N.W.
Washington, D.C. 2036
(202) 872-0670

Betty Wheeler
Hoffman & Wheeler
1088 South Madison
Amarillo, Texas 79101
(806) 376-8903

Attorneys for Respondents

Certificate of Service

I, Margaret A. Kohn, as a member of the Bar of the United States Supreme Court, and counsel to respondents Bennett, et al., certify that three copies of the foregoing Brief for Respondents in Opposition were mailed this 27th day of May, 1983, with first class postage prepaid, to opposing counsel:

Alan B. Jones
Harlow Sprouse
Underwood, Wilson, Berry,
Stein & Johnson
P.O. Box 9158
Amarillo, Texas 79105
Attorneys for Petitioners

Margaret A. Kohn